

Energy Savings Performance Contracting Guidelines for State Agencies

Part 2 For The Owner (Agency) Contract Structure, Essential Elements, and Certifications

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Texas Government Code 2166.406 Contract Requirements

Term: The state agency may enter into an energy savings performance contract for a period of more than one year only if the state agency finds that the amount the state agency would spend on the energy or water conservation measures will not exceed the amount to be saved in energy, water, wastewater, and operating costs over 20 years from the date of installation.

Contractor Experience: A state agency may enter into energy savings performance contracts only with a person who is experienced in the design, implementation, and installation of the energy or water conservation measures addressed by the contract.

Self Funding: The total savings guaranteed during the Contract term must be equal to or greater than the total project costs during the term.

Annual Payment Limitation: If the term of the contract exceeds one year, the agency's contractual obligation, including costs of design, engineering, installation, and anticipated debt service, in any one year during the term of the contract beginning after the final date of installation may not exceed the total energy, water, wastewater, and operating cost savings, including electrical, gas, water, wastewater, or other utility cost savings and operating cost savings resulting from the measures, as determined by the state agency in this subsection, divided by the number of years in the contract term.

Guarantee: An energy savings performance contract shall contain provisions requiring the provider of the energy or water conservation measures to guarantee the amount of the savings to be realized by the state agency under the contract.

Payment and Performance Bond: Before entering into an energy savings performance contract, a state agency shall require the provider of the energy or water conservation measures to file with the agency a payment and performance bond relating to the installation of the measures in accordance with Chapter 2253. The agency may also require a separate bond to cover the value of the guaranteed savings on the contract.

Code Compliance: Each energy or water conservation measure must comply with current local, state, and federal construction, plumbing, and environmental codes and regulations.

Utility Cost Reduction Measure (UCRM): a measure to reduce energy or water or operating costs of governmental facilities. The term includes:

- (1) insulation of a building structure and systems within the building;
- (2) storm windows or doors, caulking or weather stripping, multiglazed windows or doors, heat absorbing or heat reflective glazed and coated window or door systems, or other window or door system modifications that reduce energy consumption;

- (3) automatic energy control systems, including computer software and technical data licenses:
- (4) heating, ventilating, or air-conditioning system modifications or replacements that reduce energy or water consumption;
 - (5) lighting fixtures that increase energy efficiency;
 - (6) energy recovery systems;
 - (7) electric systems improvements;
- (8) water-conserving fixtures, appliances, and equipment or the substitution of non-water-using fixtures, appliances, and equipment;
 - (9) water-conserving landscape irrigation equipment;
- (10) landscaping measures that reduce watering demands and capture and hold applied water and rainfall, including:
- (A) landscape contouring, including the use of berms, swales, and terraces; and
- (B) the use of soil amendments that increase the water-holding capacity of the soil, including compost;
- (11) rainwater harvesting equipment and equipment to make use of water collected as part of a storm-water system installed for water quality control;
- (12) equipment for recycling or reuse of water originating on the premises or from other sources, including treated municipal effluent;
- (13) equipment needed to capture water from nonconventional, alternate sources, including air conditioning condensate or graywater, for nonpotable uses;
- (14) metering equipment needed to segregate water use in order to identify water conservation opportunities or verify water savings; or
- (15) other energy or water conservation-related improvements or equipment including improvements or equipment related to renewable energy or nonconventional water sources or water reuse.

Utility Assessment Report (UAR): The UAR must be reviewed by a third party Engineer in accordance with applicable statutory requirements.

Required Third Party Review of Cost Savings: Texas Statute requires that the Utility Assessment Report (detailed audit) be reviewed by an independent third party engineer licensed in Texas.

Key Components of an Energy and Water Savings Performance Contract

I. List of Contract Documents

- 1. Utility Assessment Report (UAR)
- 2. Measurement and Verification Plan (M&V Plan)
- 3. Utility Assessment Report Agreement (also referred to as an Investment Grade Audit or Detailed Utility Audit)
- 4. Implementation Agreement
- 5. Sample Periodic Savings Report

II. Project Description

This section provides an overview of the project. It should include a brief description of why the state agency is entering into the Contract, a general list of retrofits or improvements being performed under the terms of the Contract, the cost of the Contract, a brief description of services to be provided, a brief description of the financing method used, and a description of the savings that will be used to pay for the project. This section should also describe the guarantee associated with the project and any bonding associated with it.

III. Terms and Conditions

A. Scope of the Project

This section provides a detailed description of the project, including equipment to be purchased, a list of retrofits, locations of the retrofits, and number of retrofits (i.e., fixture counts, number of pieces of equipment replaced, and size of chillers/boilers, etc.). The resolution of this information is the Owner's decision. It should be no less than the resolution in the energy and water assessment report submitted to the independent third party for review. The intent of this section is to give both parties a clear understanding of the retrofits and services that are included under the Contract. The contract should reference the scope of work contained in the Utility Assessment Report (UAR) dated XX/XX/XXXX. If the UAR changes between the time it is submitted to the owner, the contract should reference the Revised UAR dated XX/XX/XXXX.

B. Performance Bonds for Construction

This section describes in detail the payment and performance bonds provided with the project as they pertain to construction. This is covered in Chapter 2253 of the Texas Government Code.

C. Guarantee

This section explains how the guarantee will work, including the following:

- Source of energy and water savings
- Source of operational savings (operational savings are not energy or water savings).

- Conditions for reimbursement from the ESCO in the event of energy and water savings shortfall
- Conditions for reimbursement from the ESCO in the event of operational savings shortfall.
- Predetermined escalation rates shall not be utilized.
- A clear description of how any changes in utility rates are treated with respect to the guarantee.

All guaranteed savings should be consistent with the guaranteed savings presented in the Utility Assessment Report. The UAR should become part of the Contract. The guaranteed savings should be listed in the UAR report.

D. ESCO Compensation

This section details the total cost of the project and the method of payment. It should include frequency of payments, billing procedure, and costs for any service contracts during the construction phase of the project and after construction is complete.

E. Insurance

This section details the insurance provided by the ESCO for the project. It is incumbent on the Owner to require the proper amounts of insurance for the specific types of work being performed under the Contract.

F. Owner Obligations

This section describes any obligations of the Owner in conjunction with the Contract. The listed items are negotiable in most contracts and responsibility for them should depend on the Owner's needs and capabilities. Major obligations that should be addressed include the following:

- Retaining an independent third party engineer licensed in Texas to review the required Utility Assessment Report.
- Repair or replacement of any existing equipment not included in the Contract
- Information such as prints, schedules, billings, logs, etc.
- Responsibilities during the ongoing monitoring of the project
- Ongoing maintenance requirements following completion
- Any disposal of materials not covered in the Contract
- Operation of the facility in accord with the Contract

G. ESCO Obligations

This section describes any obligations of the ESCO in conjunction with implementation of the project according to the project description. Major obligations that should be addressed include the following:

- Accounting Records
- Supervision responsibilities of employees and/or subcontractors
- Procedures for coordinating work

- Warranties
- Taxes
- Compliance with laws, rules, ordinances, regulations, etc.
- Financing (if required)
- Ongoing support
- Financial Guarantee
- Material removal and disposal
- M&V Plan
- Periodic Savings Reports

H. Conditions of Default – Remedy

- Any actions or conditions that would result in default of the Contract by the Owner
- Any actions or conditions that would result in default of the Contract by the ESCO

I. Dispute Resolution

- Methods for resolving disputes
- Venue for any dispute resolution
- Involvement of third parties

J. Early Termination

- Terms and/or conditions for early termination by the Owner
- Financial considerations of early termination such as penalties, payments, etc.

K. Schedules

1. Measurement & Verification Plan

All Measurement & Verification plan should be consistent with the plan presented in the Utility Assessment Report and should address the following:

- Methodology of how energy and water savings are measured
- Methodology of how operational savings are measured
- Methodology of how energy and water savings are valued (use base year rate)
- Methodology of how operational savings are valued (describe origin of information and complete description of savings)

2. Operational Parameters

All anticipated and required equipment operational parameters should be described and included in the UAR and in the M&V plan. These parameters include but are not limited to the following:

- Hours of operation
- Temperatures
- Operating Schedules
- Humidity Requirements
- Other identified operational requirements that the ESCO and Owner needs to consider prior to calculating projected savings.

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All operational parameters should be listed in the M&V plan with procedures in place to take into account owner required changes to the agreed upon parameters.

All operational parameter information should be consistent with the parameters presented in the Utility Assessment Report (UAR). This information should become part of the Contract.

3. Maintenance Requirements

- Any required maintenance contracts or services provided by the ESCO
- Required levels of maintenance by Owner

4. ESCO Supplied Training

- Specific training supplied as part of the project
- Any additional training required by the Owner

5. Project Financing (if applicable)

This section describes any financing relationship between the ESCO and the Owner that is required as part of the Contract.

IV. Attachments to the Contract

- A. The Utility Assessment Report
- B. The Measurement and Verification Plan
- C. The Periodic Savings Report

Third Party Independent Review

State law requires that an independent third party review of the UAR be conducted by a licensed engineer. This review, at a minimum, must be both an assessment of the overall project scope of work and a technical review of the consumption savings methodology, project investment, and economic justification. The review must include reviews of the following documents:

- The Contract (Review from a technical perspective. This is not a legal review)
- The UAR
- The M&V Plan
- Sample Periodic Utility Savings Report

The reviewer must certify that these documents have been reviewed and are complete in identification and development of potential utility costs reduction projects. The third party reviewer must check that the Contract, UAR, and M&V Plan present a cohesive package that fully describes the intended scope of services. The reviewer must also provide a check of the project's technical details, including energy audit procedures, the savings calculation methodology, commitment to comply with state energy and water conservation standards, any stated assumptions in developing the costs and savings, applicability of energy and water utility

reduction projects, methodology for development of the utility baseline, and procedure for verifying savings post-installation.

Agency Checklists and Certifications

In order to fulfill the requirements of Texas Government Code § 2166.406 (i), the following documents, which are found on the following pages of Section 2 of these Guidelines, must be completed by the State Agency. A State Agency may not enter into an Energy Savings Performance Contract unless it has been approved by the State Energy Conservation Office. The Energy Savings Performance Contract Approval Checklist and Certifications will serve as the vehicle for SECO review and approval.

- 1. STATE AGENCY APPROVAL CHECKLIST
- 2. STATE AGENCY CHIEF FINANCIAL OFFICER CHECKLIST
- 3. AGENCY GENERAL COUNSEL CONTRACT CHECKLIST
- 4. PROJECT COST SUMMARY TABLE

Energy Savings Performance Contracts STATE AGENCY APPROVAL CHECKLIST

State	Agency	//Owi	ner:	
ESCO)/Contr	actor:	·	
Contr	act Nar	ne/Nı	ımber:	
Date	of Revi	ew: _		
Texas Savin	Gover gs Perf	nmen Torma	t Code § 2166.406 (i), t	lete this checklist in order to fulfill the requirements of therefore, a State Agency may not enter into an Energy is checklist has been completed and approved by the
At the	e minim	num, l	have the following requi	rements been met?
Yes	No			
		1)		ts were reviewed and approved by a Professional he State of Texas, working for a firm licensed in the
			Document:	Page reference(s):
Yes	No	2)	The reviewer has prov to a summary report o	vided a Third Party Reviewer Certification in addition f findings?
			Document:	Page reference(s):
Yes	No	3)	The contract documer with SECO's Energy include all specified de	nt review and report were implemented in accordance y Savings Performance Contracting Guidelines and ocuments?
			Document:	Page reference(s):
Yes	No 🗀	4)	All costs associated savings, provision of project cost as represe	with the contracted review, financing, verification of bonds, and guarantees are included in the overall nted in the attached "Project Cost Summary Table?"
			Document:	Page reference(s):

Yes	No	5)	The review demonstrated that t than the cost of the project each	he savings achieved will be equal to or greater year over the life of the Contract?
			Document:	Page reference(s):
Yes	No	6)	A "no-conflict of interest" cert provided?	ification for any third party ESPC reviewer is
			Document:	Page reference(s):
Yes	No	7)	The Contract requires complian statutes?	nce with all applicable federal, state, and local
			Document:	Page reference(s):
Yes	No	8)	The Contract contains a Utility Verification Plan that document document future energy and was project?	y Assessment Report and a Measurement and nents current energy consumption and will ater savings that occur as a direct result of the
			Document:	Page reference(s):
Yes	No	9)	The contracting Agency will p Report Certification Forms upo	provide a copy of all Periodic Utility Savings on receipt to SECO?
			Document:	Page reference(s):
Yes	No 🗆	10)	The offeror has provided a payr	ment and performance bond?
			Document:	Page reference(s):
Yes	No	11)	A copy of the Third Party Re Report has been is submitted w	view Certification and Summary of Findings ith this checklist?
			Document:	Page reference(s):
Yes	No	12)	Contract does not include a payments to the amount of det less, when guaranteed energy sa	provision allowing the contractor to limit of service or guaranteed savings, whichever is avings is not achieved?
			Document:	Page reference(s):

Yes	No	13)	required by statute?	requiring payment and performance bonds as
			Document:	Page reference(s):
Yes	No	14)	Contract includes the antic installed?	ipated types and amounts of equipment to be
			Document:	Page reference(s):
Yes	No			
		15)	submitted to SECO (prior to	y the design architect or engineer will be construction) that verifies to the agency or ion or renovation will comply with the standards ovisions of 34 TAC §19.34?
			Document:	Page reference(s):
	answe			gency to review the above referenced contract of my knowledge and in my best professional
				FOR SECO USE ONLY
(mailing add	lress)			Date Received:
(street addre	ess)			Approved By:
(City, TX)				Date Approved:OR Date Returned to Agency:
(office telepi	hone nun	ıber)		Comments:

(email address)

Energy Savings Performance Contracts <u>AGENCY GENERAL COUNSEL CONTRACT CHECKLIST</u>

State A	gency	/Ow	ner:	
ESCO/	Contra	actor		
Contrac	ct Nan	ne/N	umber:	
Date of	f Revie	ew:_		
			Savings Performance Contract ¹ . Is to add the Energy Savings Performance	here a legally valid agreement between the e Contractor (Contractor) that:
Yes	No	,		
		a)	-	Cost Reduction Measures (UCRMs) that are alled and that adequately identifies the types astalled?
			Document:	Page reference(s):
Yes	No			
		b)	Adequately identifies the total constate agency under the contract?	tractual payment obligation incurred by the
			Document:	Page reference(s):
Yes	No			
		c)	- ·	od for performing the installation of the ractor, and the time period covered by the
			UCRM installation:	
			Document:	Page reference(s):
			Contractor payment:	
			Document:	Page reference(s):
			Guarantee:	
			Document:	Page reference(s):

¹ Tex. Gov't Code §2166.406(a).

Yes	No			
		d)		conservation measure must comply with struction, plumbing, and environmental
			Document:	Page reference(s):
2.				ccompanying documents guarantee the gency under the contract which identifies:
Yes	No			
		a)	The amount of the guarantee that coincurred by the state agency for the	overs the total costs related to the contract term of the contract?
			Document:	Page reference(s):
Yes	No			
		b)	An agreed method for determining the UCRMs including the time peri	the amount of actual savings achieved by od for determining the savings?
			Document:	Page reference(s):
Yes	No			
		c)	A specified time for payment of any actual savings?	y difference between the guarantee and the
			Document:	Page reference(s):
3.	Bond	l for	Guarantee ³ .	
Yes	No			
		a)	• • •	y authority to require the contractor to file of the guaranteed savings on the contract?
			Document:	Page reference(s):

² Tex. Gov't Code §2166.406(a) & (h). ³ Tex. Gov't Code §2166.406(e).

4.	Performance Bond ⁴ .					
Yes	No	a)	Has the contractor submitted a performance bond to the agency?			
			Docum	nent:		Page reference(s):
OR						
Yes	No					
		b)	Is the contractor contractually required to submit to the state agency a leadequate performance bond that meets the requirements of checklist items. D, and E below prior to the contractor securing a contractual right to commence work compensable under the contract?			ance bond that meets the requirements of checklist items C, ior to the contractor securing a contractual right to
			Docum	nent:		Page reference(s):
						If a performance bond has been submitted, does it provide that it is:
			Yes	No	~``	
					C)	Solely for the protection of the state agency?
						Document:Page reference(s):
			Yes	No		
					D)	In the amount of the cost of installing all the UCRMs under the contract?
						Document: Page reference(s):
			Yes	No		
					E)	Conditioned on the faithful performance of the work in accordance with the plans, specifications, and contract documents?
						Document:Page reference(s):

⁴ Tex. Gov't Code §§2166.406(e); 2253.021(b).

5.	Payr	nent	at Bond ⁵ .				
Yes	No	a)	Has the contractor provided a payment bond to the agency?				
			Docum	nent: _		Page reference(s):	
OR							
Yes	No	b)	adequa below	ate payı prior to	ment the	ontractually required to provide the state agency a legally bond meeting the requirements of checklist items C and D contractor securing the contractual right to commence worker the contract?	
			Document:			Page reference(s):	
						If a payment bond has been provided, does it provide that it is:	
			Yes	No			
					C)	Solely for the protection and use of payment bond beneficiaries who have a direct contractual relationship with the prime contractor or a subcontractor to supply work, labor, or material under the contract?	
						Document:Page reference(s):	
			Yes	No			
					D)	In the amount of the cost of installing all the UCRMs under the contract?	
						Document:Page reference(s):	

⁵ Tex. Gov't Code §§2166.406(e); 2253.021(c).

I have reviewed the above referenced contract in my capacity as legal counsel for the above referenced state agency. The answers I have provided on this four page General Counsel Checklist are to the best of my knowledge and in my best professional judgment.

(signature)	
(printed name)	
(title or position)	
(mailing address)	
(street address)	
(City, TX)	
(office telephone number)	
(email address)	
(State Bar Number)	

FOR SECO USE ONLY	
Date Received:	
Approved By:	
Date Approved:OR Date Returned to Agency:Comments:	

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Energy Savings Performance Contracts STATE AGENCY CHIEF FINANCIAL OFFICER CHECKLIST

State	Agency	//Owi	ner:	
ESCO	O/Contr	actor	:	
Contr	act Nar	ne/Nı	umber:	
Date	of Revi	ew: _		
order Agen	to fulf	ill the	e requirements of Texa enter into an Energy S	ef Financial Officer (CFO) complete this checklist in s Government Code § 2166.406 (i), therefore, a State avings Performance Contract unless this checklist has I by the State Energy Conservation Office.
At the Contr		num,	have the following requ	nirements been met in the Energy Savings Performance
Yes	No			
		1)	Utility Cost Reduction	ngs Performance Contract specifically identify the Measures (UCRMs) that will be installed and types and amounts of equipment to be installed?
			Document:	Page reference(s):
Yes	No			
		2)	Accurately identifies t state agency under the	he total contractual payment obligation incurred by the contract?
			Document:	Page reference(s):
Yes	No			
		3)	Accurately identifies to covered by the financial	he payments to the Contractor, and the time period al guarantee?
			Contractor payment: I	Document:
			Page reference(s):	
			Guarantee: Document	
			Page reference(s):	

Yes	No				
		4)	Does the contract or accompanying documents guarantee the amount of savings to be realized by the state agency?		
			Document:	Page reference(s):	
Yes	No				
		5)	Does the amount of the guarantee concurred by the state agency for the	cover the total costs related to the contract eterm of the contract?	
			Document:	Page reference(s):	
Yes	No				
		6)		g documents have an agreed method for avings achieved by the UCRMs including savings?	
			Document:	Page reference(s):	
Yes	No				
		7)		documents have a specified time for the guarantee and the actual savings?	
			Document:	Page reference(s):	
Yes	No				
		8)	If the contractor is required to subn performance bond, has the contract	nit to the agency a legally adequate for submitted the performance bond?	
			Document:	Page reference(s):	
Yes	No				
		9)	If a performance bond is required, it cost of installing all the UCRMs un	is the amount sufficient to cover the total nder the contract?	
			Document:	Page reference(s):	
Yes	No				
		10)	If the contractor is required to subn payment bond, has the contractor so		
			Document:	Page reference(s):	

□ □ 11) If a payment bond has been provid installation of all the UCRMs under		ount of the cost o	f the
Document:	Page reference(s):		
Summary of Total Project Costs, Total Guara	nteed Savings an	d Project Payba	ck
	Source References		erences
	Totals	Document	Page
Contract Term (years)			
Total Third Party Review Costs	\$		
Total Utility Assessment Report and Design Costs	\$		
Total Costs of UCRMs	\$		
Total Cost of Project Financing	\$		
Total Payment and Performance Bond Costs	\$		
Total Financed Costs (B+C+D+E+F)	\$		
Total Measurement and Verification Fees	\$		
Total Project Costs Contracted (G+H)	\$		
Total Guaranteed Savings Over Contract Term	\$		
Payback (years) (I/J)	Ψ		
above referenced state agency. The answers I have pro-			
above referenced state agency. The answers I have produced in my best professional judgment.			
above referenced state agency. The answers I have produced in my best professional judgment. (signature)			
above referenced state agency. The answers I have produced in my best professional judgment. (signature)	ovided are to the b	est of my knowl	edge
above referenced state agency. The answers I have preand in my best professional judgment. (signature) (printed name)	ovided are to the b	ECO USE ONL	edge Y
above referenced state agency. The answers I have preand in my best professional judgment. (signature) (printed name)	FOR SI	ECO USE ONL	edge Y
(mailing address)	FOR SI Date Received:	ECO USE ONLY Agency:	Y

(email address)